

APR 20 1988

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In the
 Supreme Court of the United States
 October Term, 1987

RONALD GORDON, PHILIP and DOROTHY KORWEK, MARTY
 FINKELSTEIN, WILLIAM L. COHN, and JAMES G. WILLIAMS,
Petitioners,

vs.

NELSON BUNKER HUNT, WILLIAM HERBERT HUNT, LAMAR
 HUNT, INTERNATIONAL METALS INVESTMENT, CO., LTD.,
 SHEIK MOHAMMET ABOUD AL-AMOUDI, SHEIK ALI BIN
 MUSSALEM, FAISAL BEN ABDULLAH AL SAOUD, MAHMOUD
 FUSTOK, NAJI ROBERT NAHAS, BACHE HALSEY STUART
 SHIELDS, INC., BACHE GROUP, INC., MERRILL LYNCH,
 PIERCE FENNER & SMITH, INC., CONTICOMMODITY SER-
 VICES, INC., CONTICAPITAL MANAGEMENT, INC., CONTI-
 CAPITAL LTD., NORTON WALTUCH, MELVIN SCHNELL,
 GILION FINANCIAL, INC., BANQUE POPULAIRE SUISSE, AD-
 VICORP ADVISORY AND FINANCIAL CORPORATION, S.A.,
 COMMODITY EXCHANGE, INC., THE BOARD OF TRADE OF
 THE CITY OF CHICAGO, ACLI INTERNATIONAL COMMODITY
 SERVICES, INC., LITRADEX TRADERS, S.A., and JOHN DOES 1
 THROUGH 15,

Defendants,

MAHMOUD FUSTOK,

Respondent.

**BRIEF OF MAHMOUD FUSTOK IN OPPOSITION TO A
 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
 STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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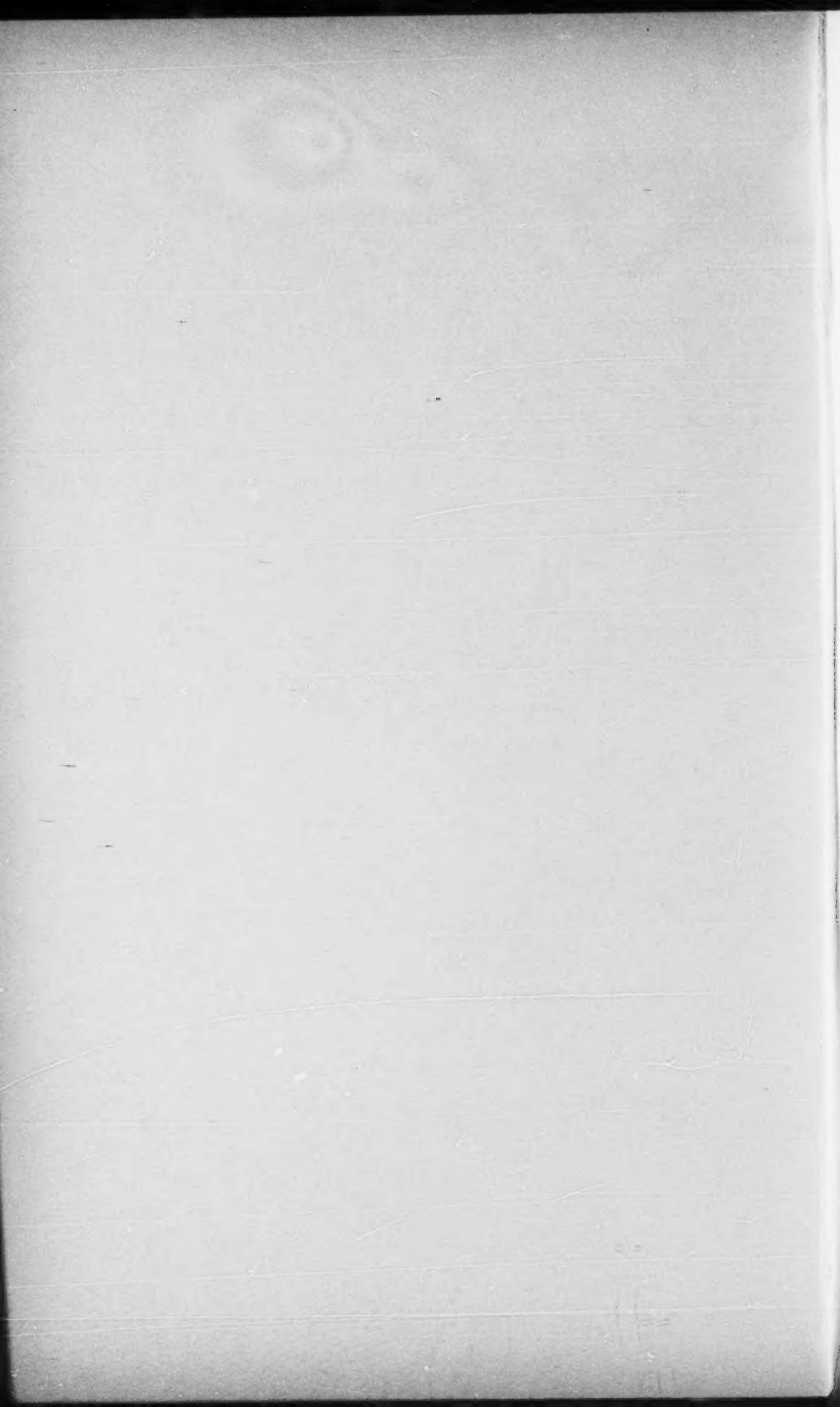
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QUESTION PRESENTED

Whether the decision of the court below, affirming the dismissal of petitioners' actions pursuant to Fed. R. Civ. P. 4(j) for failure without good cause to effect timely service of the summons and complaint, raises an important issue of federal law that has not been, and should be, settled by this Court.



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MAHMOUD FUSTOK,

Respondent.

BRIEF OF MAHMOUD FUSTOK IN OPPOSITION TO
A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

Respondent, Mahmoud Fustok, submits this brief in opposition to a petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit which affirmed, per curiam, the orders and final judgment entered by the United States District Court for the Southern District of New York (the Hon. Morris E. Lasker).

Statement of the Case

These actions, which were consolidated for appeal, are brought on an individual and class basis for violations of federal and state law arising out of events in the silver market in 1979 and 1980. Respondent Fustok is one of approximately twenty named defendants. He is a citizen of Saudi Arabia who resides and has business interests in London, Paris and the United States. (7a.)* Fustok is a regular visitor to the United States and has spent the winter months each year in Fort Lauderdale, Florida since prior to 1981. (*Id.*) In 1986, he was present in a courtroom of the federal courthouse for the Southern District of New York during each day of a four-week trial in which he was the plaintiff and which also related to certain events in the silver market in 1979-80. (8a.)

Although Fustok was named and successfully served in four other actions arising out of the events in the silver market in 1979 and 1980, Fustok was not served in the these actions until almost five years after the filing of the *Gordon* complaint and more than two years after the filing of the *Korwek* complaint. (11a.)

On Fustok's motion to dismiss the actions under Fed. R. Civ. P. 4(j) for failing to effect timely service of the complaints, the district court dismissed both actions

*Citations are to the decisions and orders of the courts below assembled in the appendix to petitioners' writ.

without prejudice, holding that petitioners had failed to show "good cause" for failing to serve Fustok within the 120 days provided by Rule 4. (29a, 30a.) The district court also held that petitioners' initial attempts in the *Gordon* case to serve Fustok by mail did not of themselves constitute effective service in view of the court's further finding that the mailings had never been received by Fustok. (13a-14a.) The decision of the district court was affirmed in its entirety on appeal for the reasons stated in the district court's opinion at 116 F.R.D. 313 (S.D.N.Y. 1987). (1a-3a.)

Summary of Argument

The decisions below are correct as a matter of law and fact. Notwithstanding the initial attempts to serve Fustok by mail in the *Gordon* action (no attempt to serve by mail was made in *Korwek*), petitioners failed to show good cause for failing to serve Fustok for up to five years after the first complaint was filed, or for failing to request additional time (as provided by Fed. R. Civ. P. 6(b)) from the district court to effect service.

Nothing in the findings and decisions by the courts below is in conflict with existing federal precedent nor do the decisions raise important questions of federal law that have not been, or should be, settled by this Court. Fustok was served personally in New York and the validity of that service must be tested by the standards of Rule 4(j). The fact that Fustok resides primarily abroad does not create an exception to the 120 day rule of Fed. R. Civ. P. 4(j), which governs service in the United States. Moreover, where the evidence showed that the summonses and complaints mailed by petitioners were never received by Fustok, the district court correctly held that merely mailing the summons and complaint in conformity with the rule did not constitute effective service.

ARGUMENT

POINT I

THERE IS NO BASIS IN LAW OR FACT FOR CREATING AN EXCEPTION TO THE EXPRESS LANGUAGE OF RULE 4(j) FOR NON-RESIDENT ALIEN DEFENDANTS AND THE FAILURE OF THE COURTS BELOW TO CREATE SUCH AN EXCEPTION DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW.

Although petitioners attempted service upon Fustok by mail to his office address in London, that mail was never received by Fustok. He was later served in hand with the summons and complaint but that service was not effected until he appeared for a deposition in another case in New York. Service made personally upon a defendant in the United States is governed by Rule 4(j) and subject to a 120-day limitation.

Petitioners' argument that in these circumstances they should be exempted from the clear and unambiguous requirements of Rule 4(j), would have the effect of creating an unlimited -- and clearly unintended -- exception for service made upon defendants who reside primarily abroad. Rule 4(j) requires that service be completed within 120 days of filing unless good cause can be shown for not doing so. The rule states that these requirements shall not apply to "service in a foreign country" pursuant to Rule 4(i). Petitioners have argued that Rule 4(j) should, in effect, be rewritten to state that it also does not apply to service in the United States if the defendant is a "foreign resident." That argument fails for two reasons.

First, Rule 4(j) is expressly written to exclude only service made "*in a foreign country*." For such service, Rule

4(i) sets forth the various methods that may be used to effect service *in that country*, including service through letters rogatory, personal delivery in that country, or mail addressed and dispatched through the clerk of the court. Had the framers of Rule 4(j) intended to create the exception petitioners argue they are entitled to here, it would have been a simple matter to state expressly that the 120 day limit also does not apply to service upon a foreign resident, wherever he may ultimately be served. No such additional exception was stated and there is no basis for taking the extraordinary step of creating such an exception through judicial interpretation.*

Second, even if service upon Fustok were to be governed by Rule 4(i), that Rule is not without some limitations. We know of no case in which service by mail upon a person residing in another country could be effective without *any* limitation of time. In the absence of a fixed number of days, such as the 120 day limit provided by Rule 4(j), the effectiveness of service should be judged by the standards of due diligence that prevailed prior to the amendments to Rule 4. Whether measured by the 120 day rule or the due diligence standard, the lapses of two and five years between filing and serving these complaints is not justified by any evidence of due diligence, and the district court so found. (23a-24a.)

*Petitioners cite to a "suggestion" in a Second Circuit decision that Rule 4(j) does not apply where a plaintiff attempted to serve a defendant in a foreign country. *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2d Cir. 1985). In fact, there is no such suggestion made anywhere in that decision and Judge Lasker, in the district court opinion in the instant actions, relied on *Montalbano* in dismissing the very argument petitioners advance on this writ. (15a).

POINT II

GIVEN THE FINDINGS BELOW THAT THERE WAS NO EVIDENCE OF ACTUAL DELIVERY OF THE SUMMONS AND COMPLAINT, NO IMPORTANT QUESTION OF FEDERAL LAW IS RAISED BY THE HOLDING THAT SERVICE WAS NOT DEEMED EFFECTIVE MERELY BY MAILING.

Petitioners argue that having taken "all the required acts" to attempt service by mail in the *Gordon* case (they concede no such steps were taken in *Korwek*), the service should be deemed effective once those steps were complete. In support of this argument, they rely upon *Morse v. Elmira Country Club*, 752 F.2d 35, 39 (2d Cir. 1984), and cases under Rule 4(c)(2)(C)(ii) where mailings were made but no signed acknowledgments were received. *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 4, 9 (S.D.N.Y. 1975); *Bersch v. Drexel Firestone, Inc.*, 389 F. Supp. 446, 462-63 (S.D.N.Y. 1974), modified on other grounds, 519 F.2d 972 (2d Cir.), cert. denied, 423 U.S. 1018 (1975).

Those cases are readily distinguishable from the circumstances in *Gordon*. In *Gordon*, the district court made an affirmative finding that the summons and complaint were never delivered to Fustok's London office address. (13a-14a.) In *Morse v. Elmira Country Club*, on the other hand, there was no evidence that the complaint had not been received and the court concluded that "[i]n the absence of any contrary indication we assume delivery in due course," 752 F.2d at 36 n.2. In the other two cases (and the line of cases like them) the decisions turn on evidence of actual receipt. See *Hunt v. Mobil Oil Corp.*, 410 F. Supp. at 9 (foreign defendant had received the complaint and signed the return receipt; its only argument for

defective service was based on the fact that the complaint had not been enclosed in official stationery of the court clerk); *Bersch v. Drexel Firestone, Inc.*, 389 F. Supp. at 462-63 (court made specific finding of actual receipt based upon markings on the mailing envelope). *See also* cases cited by Judge Lasker in the district court opinion below. (13a.)

Fustok produced sufficient evidence to rebut any assumption that the *Gordon* mailings had been received in due course and the district court below made an affirmative finding of non-delivery. Based on that finding, the court properly held that no valid service by mail under Rule 4(c)(1)(D) had been made. That decision was proper as a matter of law and fact and raises no important question of federal law to be settled by this Court.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that petitioners' writ be denied.

New York, New York
April 21, 1988

Respectfully Submitted,

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